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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

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3 JEFFREY H. WALDEN,  
4 individually and on behalf of  
5 all other persons similarly  
6 situated,

Plaintiffs,

New York, N.Y.

v.

14 Civ. 112(ER)

7 SANITATION SALVAGE CORP, et  
8 al.,

9 Defendants.

10 -----x

11 November 5, 2015  
12 10:00 a.m.

13 Before:

14 HON. EDGARDO RAMOS,

District Judge

15  
16 APPEARANCES

17  
18 BRONSON LIPSKY, LLP  
19 Attorneys for Plaintiffs  
20 BY: DOUGLAS B. LIPSKY

21 TRIVELLA & FORTE, LLP  
22 Attorneys for Defendants  
23 BY: CHRISTOPHER A. SMITH  
24  
25

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1 (Case called)

2 MR. LIPSKY: Good morning, your Honor. Doug Lipsky,  
3 of Bronson Lipsky, for the plaintiffs.

4 MR. SMITH: Good morning, your Honor. Christopher  
5 Smith for the defendants.

6 THE COURT: Good morning to you both.

7 Last time I guess I had dealings with this matter I  
8 issued an opinion in which I dismissed one plaintiff but not  
9 another on summary judgment because I determined that  
10 additional discovery was necessary before summary judgment  
11 could be determined. Thereafter, Mr. Lipsky, nothing happened,  
12 and I am wondering why that was?

13 MR. LIPSKY: That is correct, your Honor. Nothing  
14 happened because no discovery requests were served because  
15 there was no Rule 16 or Rule 26 conference, and the rules  
16 require the Rule 26 conference to occur before the parties can  
17 discovery requests.

18 THE COURT: The Rule 26 conference occurs without  
19 intervention of the court, correct?

20 MR. LIPSKY: That is correct, your Honor. The main  
21 reason we held off is usually, one, the court scheduling a Rule  
22 16 conference triggers a deadline by when the Rule 26  
23 conference needs to occur by, and we were hesitant to request a  
24 scheduling, being cognizant -- recognizing that the court's  
25 calendar is heavy and criminal cases take priority. And

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1 defense counsel's letter came at a rather ironic time, when we  
2 were about to send that letter to the court requesting that the  
3 Rule 26 conference be scheduled -- I'm sorry, Rule 16  
4 conference be scheduled.

5 THE COURT: As plaintiff, it is your responsibility to  
6 move this case forward. How many months passed?

7 MR. LIPSKY: There were six months between the court's  
8 order and the request for the conference.

9 THE COURT: In my experience, the Rule 26 conference  
10 occurs prior to the Rule 16 conference; but in any event, where  
11 are we? Mr. Smith, did you wish to say something?

12 MR. SMITH: Yes, your Honor.

13 On March 30 you issued an order that basically granted  
14 them limited discovery -- it is on page 9 of your order -- with  
15 respect to the issues that Mr. Lipsky's declaration, he  
16 believed he needed additional discovery on.

17 Just to refresh your recollection, not only did you  
18 dismiss the Garcia action, but you also found that, with  
19 respect to the drivers, the Motor Carrier Exemption test  
20 applies to them. You ruled dispositively that the interstate  
21 commerce prong of that test has been satisfied.

22 So the only issue that's left here is whether the  
23 helpers in the Walden case performed safety-related issues, so  
24 that that would satisfy the second prong of the Motor Carrier  
25 Exemption test. And on page 9 you specifically granted them,

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1 pursuant to Rule 56, I guess it is (d) now -- it used to be  
2 (f) -- the limited discovery they said was necessary for them  
3 to oppose the summary judgment motion, which is currently *sub*  
4 *judice*. To wit, there are -- and I included these items in my  
5 proposed discovery order, which I passed up to the court, he  
6 said he needed additional discovery on the extent of the  
7 helpers' discretion in loading the trucks; the means by which  
8 defendants communicate the purported discretionary authority to  
9 helpers; whether the helpers adhered to a policy permitted by  
10 Sanitation Salvage in performance of their duties; information  
11 regarding the discretion helpers purportedly exercise in  
12 directing their coworkers' activities in order to ensure the  
13 safe operation of the trucks, as well as the helpers'  
14 discretion as to safety activities performed along the truck  
15 routes.

16           Those were the only issues that Mr. Lipsky stated were  
17 genuine issues of fact that he needed additional discovery on.  
18 We don't believe they are genuine issues of fact. We have  
19 submitted affidavits from helpers that provide a plethora of  
20 indicia that they are performing safety operations relating to  
21 the carting vehicles, and we also submitted case law that  
22 specifically found -- although albeit not in this district,  
23 it's persuasive, but not binding -- that helpers on these type  
24 of garbage trucks do perform safety functions.

25           So you gave them that limited discovery, and they sat

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1 on their hands until they received a letter from us, basically,  
2 to the court, saying, inasmuch as they haven't asked for any  
3 discovery -- we gave them plenty of time, six months, to make  
4 their discovery requests. We received nothing. There was no  
5 requirement for a conference because (a) you specifically  
6 allowed the discovery in your order, and we had already  
7 previously had a conference, your Honor, in April of 2014,  
8 where the parties stipulated that conditional certification  
9 would be held in abeyance, and we agreed, as a *quid pro quo*,  
10 that we would toll the statute of limitations while the court  
11 addressed the Motor Carrier Exemption issue. Because if the  
12 court finds, as it did in the *Garcia* case, that the Motor  
13 Carrier Exemption applies, that would be a *sine qua non*, that  
14 would be an absolute defense to the FLSA case, and then the  
15 court would just have to decide whether, in its discretion, it  
16 wanted to exercise supplemental jurisdiction over the New York  
17 labor law causes of action.

18 We are now here, it is over a year and a half since  
19 the summary judgment motion was filed, and over six months,  
20 really seven months, now, since this court ruled on the matter.  
21 We still haven't received any discovery demands or notices for  
22 deposition; and, instead of that, we received a request from  
23 plaintiffs' counsel that they be allowed to move to  
24 conditionally certify the class.

25 So in our proposed scheduling order -- we met and

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1 conferred, he met and conferred with me in good faith regarding  
2 the discovery and the proposed scheduling order, and we just  
3 reached impasse on the basic issue of what discovery should be  
4 allowed at this time.

5 In our proposed scheduling order, we think that the  
6 court should limit the discovery to the issues that they  
7 requested and that was set forth in the March 30, 2015, order,  
8 and that's at paragraph 19 of our proposed discovery plan. We  
9 would request that the court hold all other discovery stayed,  
10 and we suggested a date of January 8, 2016, but that is open to  
11 whatever the court's discretion is. That would be the deadline  
12 for us to move for a letter motion under summary judgment as to  
13 plaintiff Walden.

14 So we think, by the end of the year, the plaintiffs  
15 could complete the limited discovery pursuant to 56(d), and  
16 then we could submit a letter to the court renewing our  
17 application. Certainly, if plaintiffs' counsel, based on  
18 whatever discovery they are able to glean, wants to submit a  
19 supplemental declaration or anything additional to this court,  
20 we wouldn't oppose that as long as we have a chance to reply to  
21 that. I don't think we need any additional discovery from  
22 plaintiff.

23 I think it is a practical approach. It was the  
24 approach that was stipulated to by the parties back in April  
25 2014, it conserves judicial resources and, inasmuch as the

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1 summary judgment motion is *sub judice*, we would like to get a  
2 ruling on that first -- we think it makes sense to -- before  
3 addressing the conditional certification issue. And we would  
4 agree, certainly, we don't want to prejudice the plaintiffs in  
5 that delay, so we would agree to continue to toll the statute  
6 of limitations as we did in April of 2014.

7 THE COURT: Mr. Lipsky.

8 MR. LIPSKY: Thank you, your Honor.

9 Just to unpack a few items in there, to begin with,  
10 discovery scope, while the other plaintiff may have conceded  
11 that the defendants are motor carrier under the MCA, that was  
12 not -- this plaintiff did not concede that; and, in fact, after  
13 the summary judgment motion was briefed, there does appear that  
14 there are issues regarding whether or not defendants are in  
15 fact a motor carrier under the MCA, and that is a particular  
16 issue we would like to explore as well as all issues relating  
17 to plaintiffs' exemption status. And plaintiffs should not be  
18 limited to the items listed in the motion. Those items were  
19 listed in the motion because those are the specific items  
20 defendants relied upon in making their motion. So to create  
21 these finite lists I think, one, would prejudice the plaintiff  
22 because not being able to explore all relevant issues.

23 THE COURT: What's relevant in addition to what's  
24 listed on here in the defendants' proposal?

25 MR. LIPSKY: Including whether or not defendants are

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1 in fact part of the continuity of interstate commerce. It has  
2 come to our knowledge that that is in fact an issue that they  
3 might not be able to establish; namely, when the materials are  
4 collected, they come to a resting spot that are then collected  
5 by another carrier. Because the transportation of the  
6 materials are all within New York State and then a third-party  
7 comes and collects the materials from New York and takes them  
8 out of state, that would break the continuity of interstate  
9 commerce. This was not an issue that was explored in  
10 defendants' motion, but it is a particularly relevant issue  
11 that plaintiff would like to explore.

12 THE COURT: Is it the case, Mr. Lipsky, that within  
13 the context of the Motor Vehicle Exemption, the individual him  
14 or herself would have to have crossed interstate lines in order  
15 to come within the exemption?

16 MR. LIPSKY: It is not, your Honor. If the other  
17 operations are intrastate, they can still become a motor  
18 carrier under the MCA if they are part of the continuity of  
19 interstate commerce. For example, if they are just  
20 transporting goods within the State of New York, they bring the  
21 goods to a warehouse, and then another party comes and collects  
22 those goods and takes them to New Jersey. The transportation  
23 of those goods just within New York is deemed part of that  
24 stream of interstate commerce. From plaintiffs' perspective,  
25 we have come to learn that there might be a sever in that



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1 interstate commerce flow.

2 THE COURT: Mr. Smith, is that correct?

3 MR. SMITH: No, it is not, your Honor. I am looking  
4 for the portion of your order that you specifically found that  
5 they didn't bring it to contest the interstate commerce prong  
6 of the Motor Carrier Exemption. In fact, the only issues of  
7 fact that they requested discovery on -- it's on page 9 of your  
8 order -- related to the safety of the helpers. So you have  
9 ruled dispositively on that first prong. And really, with  
10 respect to the second prong --

11 THE COURT: The first prong being what?

12 MR. SMITH: Whether it be the interstate commerce --  
13 my understanding is that under Motor Carrier Exemption there  
14 are two prongs that are involved. One is that the entity --  
15 there has to be an interstate commerce activity, and the second  
16 would be that the individuals that are at issue would be  
17 performing safety operations with respect to the garbage  
18 vehicles.

19 THE COURT: But I don't recall dealing with this  
20 issue, the precise issue raised by Mr. Lipsky, in the opinion.  
21 My question to you is, is it the case that if there is a helper  
22 that helped to load goods that came from, say, Canada and  
23 helped unload goods in Buffalo and then those goods were then  
24 taken to Poughkeepsie and then taken to New Jersey, if the  
25 worker was only involved in the link between Buffalo and

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1 Poughkeepsie, are they exempt from the interstate exemption?

2 MR. SMITH: The Motor Carrier Exemption would still  
3 apply, your Honor, as long as the intention of the party was to  
4 move the goods outside of the borders of New York State which,  
5 in this case, we have submitted affidavits which were not  
6 opposed and your Honor found were dispositive on that issue,  
7 that garbage is moved from here and then actually moved from a  
8 transfer station, I believe, to China. I forget whether it was  
9 China or India, but someplace outside of New York State.

10 On the issue of the safety, your Honor, with respect  
11 to this particular plaintiff, the plaintiff, they have got an  
12 obligation under Rule 56.1 and otherwise to set forth a genuine  
13 issue of fact requiring trial on the safety issue. For this  
14 particular plaintiff, he didn't do that. You will see there  
15 are two affidavits that have a significant number of items  
16 where we claim that the helpers performed safety functions. In  
17 the opposition papers, the plaintiff doesn't deny that those  
18 are actually done by the helpers. In fact, Mr. Lipsky's  
19 argument was, I can't glean that information, I can't oppose  
20 that information through the use of the plaintiffs, so I need  
21 this additional information, I need to speak to other helpers,  
22 for instance, in the company, and that's why they requested the  
23 limited discovery and you granted it. We have been available  
24 to provide helpers. We don't think there is a general issue of  
25 fact on that. But certainly, if you give me a moment, I can

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1 see if I can find the section where you found that it was  
2 dispositive because they didn't oppose it in their papers.

3 THE COURT: In any event, look --

4 MR. SMITH: I will find it in a moment, Judge, but I  
5 remember specifically reading it. In fact, on page 9, since  
6 the only issue you are granting limited discovery on was the  
7 safety issue -- well, you have got it on footnote 2, page 8,  
8 you have got, "The parties agree that Sanitation Salvage is  
9 subject to the Secretary's jurisdiction because it is a 'motor  
10 carrier' as that term is defined by the statute."

11 THE COURT: Here is where I am. Because, as I  
12 understand it, the defendants have agreed to toll the statute  
13 of limitations with respect to any individual worker who might  
14 otherwise be affected, and because I did grant the parties the  
15 ability to take that limited discovery, and because of the  
16 preference certainly within this district to decide all of  
17 these issues on the merits, I am going to take us back to where  
18 we were six months ago and I am going to enter the proposed  
19 scheduling order proposed by the defendants which has a  
20 discovery cutoff of the end of this year. If there are  
21 legitimate scheduling problems with the holidays coming up that  
22 will prevent the discovery from taking place prior to December  
23 30, the parties should contact chambers immediately and provide  
24 a proposed schedule for going forward. Again, there has to be  
25 a very good reason for doing that. I am saying this in advance

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1 because I know that the holidays are coming up. We will  
2 schedule our next case management conference for early in  
3 January.

4 Ms. Rivera.

5 THE DEPUTY CLERK: January 8, 2016, at 11:30 a.m.

6 THE COURT: This order will be put on ECF today, and  
7 then when we complete that, we will be able to take up  
8 Mr. Lipsky's proposed motion for certification.

9 MR. LIPSKY: Your Honor?

10 THE COURT: Yes, sir.

11 MR. LIPSKY: Two issues on that. One, the discovery  
12 plan that plaintiff proposed contemplated while plaintiff was  
13 taking discovery on the exemption issue, keeping discovery as  
14 efficient as possible, we would also explore the policies that  
15 are applied to the putative class, which is only a marginal  
16 increase of the discovery. For example, the question of what  
17 policies applied to Mr. Walden will instead be what policies  
18 applied to the helpers. By being able to obtain that  
19 discovery, if the court denies defendants' renewed motion,  
20 plaintiff would then be able to promptly move for Rule 23 class  
21 certification and to conditionally certify the collective  
22 action. Defendants' proposal contemplates plaintiff redeposing  
23 everyone, asking almost the same exact questions, but now on a  
24 broader scale, which is not going to increase by meaningful  
25 amount the amount of discovery at issue but would allow that

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1 motion to be made much quicker and avoid the expense of having  
2 to redepose everyone.

3 I just also wanted to understand if, by entering  
4 defendants' order, does that preclude plaintiff from exploring  
5 whether or not defendant is a motor carrier under the MCA?

6 THE COURT: Hasn't that been determined?

7 MR. LIPSKY: Respectfully, it has not, your Honor. In  
8 the footnote, it states that the parties do not dispute whether  
9 or not the secretary has exercised jurisdiction over the  
10 defendant and, in the very case that defendants heavily rely  
11 on, the *Graham v. Town & Country*, the Western District of  
12 Missouri explains that is not dispositive of that issue even  
13 when they are licensed by the DOT. It still remains an issue  
14 of whether or not they are part of the continuity of interstate  
15 commerce. So merely because the DOT is exercising jurisdiction  
16 doesn't make them -- does not qualify them as motor carriers.

17 THE COURT: What are you proposing?

18 MR. LIPSKY: We would like to depose them on whether  
19 they are in fact a motor carrier under the MCA, exploring the  
20 interstate commerce flow of the items at issue.

21 THE COURT: Mr. Smith.

22 MR. SMITH: Your Honor, the only discovery that he  
23 said he needed with respect to the summary judgment motion  
24 related to the safety issues on page 9 in your order. You  
25 specifically delineated those issues, giving them every single

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1 item that he was looking for in his declaration. We  
2 respectfully oppose plaintiffs' application to expand  
3 discovery. Yes, it is possible that individuals' deposition  
4 may have to be taken twice, and we are willing to incur that  
5 additional expense if it occurs; but it is also possible that  
6 the court may grant summary judgment and that the limited  
7 depositions would result in conservation of judicial resources  
8 and the financial resources of my client.

9 With respect to the depositions, I am a little bit  
10 surprised that they are arguing now that they need this  
11 discovery immediately so they can efficiently and as soon as  
12 possible file their initial certification motion. In April of  
13 2014, they were willing to stipulate that that additional  
14 certification motion be held in abeyance pending a hearing and  
15 determination of the summary judgment motion on --

16 THE COURT: Mr. Smith, I am entering your proposed  
17 order. We are adjourned.

18 MR. SMITH: Thank you, your Honor.

19 MR. LIPSKY: Thank you, your Honor.

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